The First Amendment, High School Students, and the Possibility of Psychological Harm: Trachtman v. Anker

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THE FIRST AMENDMENT, HIGH SCHOOL STUDENTS, AND THE POSSIBILITY OF PSYCHOLOGICAL HARM:
TRACHTMAN V. ANKER

INTRODUCTION

In the fall of 1975, two Manhattan high school students unsuccessfully sought permission from their principal to survey students' sexual attitudes for the school paper. Initially they had planned to conduct oral interviews; later they switched their format to a questionnaire to be randomly distributed and anonymously returned. The survey covered sexual stereotypes, contraception, and students' opinions about the adequacy of their sex education, and asked them to classify themselves as heterosexual, homosexual, or bisexual, and to comment on the extent of their sexual experience. A letter attached to the questionnaire stressed that it would remain "completely confidential." It also contained the following words of caution: "you are not required to answer any of the questions and if you feel particularly uncomfortable—don't push yourself." The purpose of the survey, according to the letter, was to provide information for "a human article expressing human feelings on an underplayed and extremely important part of our lives." After the Administrator of Student Affairs denied permission, the students submitted the survey and cover letter to Irving Anker, Chancellor of New York City Public Schools. When Anker did not respond, they wrote to the Secretary of the Board of Education for permission to distribute the survey. Approximately five weeks later the Board sent the students a letter refusing permission on the ground that such a survey could be conducted only by professional researchers with the permission of the students' parents. When the students requested reconsideration, the Board responded that in its opinion the questions might harm many students.

In August, 1976, Jeff Trachtman, editor-in-chief of the school paper, and his father brought an action against the high school principal, Anker, the Administrator of Student Affairs, and the Board of Education seeking declaratory and injunctive relief under 42 U.S.C. § 1983. They alleged that prohibition of circulation of the question-
naire and publication of its results violated the first amendment. After the case was tried upon affidavits submitted by the parties and expert witnesses, the district court ruled that ninth and tenth graders should not be polled, but that eleventh and twelfth graders might participate in the survey, subject to certain restrictions to be negotiated by the parties.⁴ Both plaintiffs and defendants appealed. Held, reversed in part, one judge dissenting. Defendants could not be enjoined from preventing distribution of the survey to eleventh and twelfth graders. School authorities with reason to believe that psychological harm might result to students surveyed at school may prohibit such questioning without violating the constitutional rights of those seeking to publish the results. Trachtman v. Anker, 563 F.2d 512 (2d Cir. 1977), cert. denied, 98 S. Ct. 1491 (1978).

I. THE FIRST AMENDMENT BACKGROUND: TINKER, BURNSIDE, AND THE SECOND CIRCUIT

The starting point for the Trachtman court's discussion was Tinker v. Des Moines Independent Community School District,⁵ the leading case on the first amendment rights of high school students.⁶ In Tinker, public school students suspended for wearing black armbands to school in protest of the Vietnam War challenged the constitutionality of a school policy forbidding armbands. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"⁷ the Supreme Court stated. In an opinion by Mr. Justice Fortas, the Court held that the students' actions closely resembled "pure speech," and were fully protected by the first amendment.⁸

⁴ Judge Motley ordered the parties to "agree on a plan by which to distribute, collect and publish the survey." Id. at 204. Negotiators were to include "a student representative, a parent representative . . . the principal . . . and a representative of the Board of Education." Id. A faculty member was to oversee distribution and collection of the survey, and plans were made "for both confidential and public discussion groups for students who would like to talk with school personnel" after the survey results were published. Id.
⁵ 393 U.S. 503 (1969).
⁷ 393 U.S. at 506.
⁸ Id. at 505-06.
The defendant school officials in *Tinker* had attempted to justify their action by arguing that it was prompted by fear of the disruption that might result from the demonstration. The Court, however, found those fears speculative, stating that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Balancing the interests of a group of students in first amendment expression against school officials' right to determine that "the schools are no place for demonstrations," the Court held that the burden was on the administrators to justify their actions:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in of the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

The *Tinker* majority quoted with approval an earlier Fifth Circuit case, *Burnside v. Byars*, where high school officials attempted to prevent the wearing of "freedom buttons" by students, on the ground that the buttons "'didn't have any bearing on their education,' 'would cause commotion,' and 'would be disturbing [to] the school program' . . . ." Conceding that state officials might regulate speech to protect "legitimate state interests," the Fifth Circuit balanced "First Amendment rights with the duty of the state to further and protect the public school system." The *Burnside* court, recognizing the "wide latitude of discretion" vested in school authorities, confined itself to an examination of the reasonableness of the challenged action, but nonetheless concluded that the principal's behavior had been "arbitrary and unreasonable." Holding that the "Fourteenth Amendment protects the First Amendment rights of school children against

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9. *Id.* at 508.
10. *Id.* at 509 n.3.
12. 363 F.2d 744 (5th Cir. 1966).
13. *Id.* at 746-47.
14. *Id.* at 748.
15. *Id.*
16. *Id.*
17. *Id.*
[such] unreasonable rules and regulations imposed by school authorities,” the court stated:

"[W]e must also emphasize that school officials cannot ignore expressions of feelings with which they do not wish to contend. They cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms does not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."

While both Tinker and Burnside were concerned with students' seeking to express political views, neither opinion seems to have confined itself to the protection of political speech. "[P]ersonal intercommunication among . . . students," the Court noted in Tinker, is "an important part of the educational process." Until Trachtman, the courts in the Second Circuit adhered to the Tinker requirement of physical disruption, rejecting other rationales for interference with first amendment rights advanced by school administrators. An attempt to regulate expression because of its moral influence was unsuccessful in Bayer v. Kinzler, which held that a high school principal had violated the free speech rights of his students when he seized 700 undistributed copies of a student newspaper article on contraception. The defendant principal's claims that the paper posed a "'clear and present danger' that [would] bring about substantial evils that the state has a right to prevent" and that it violated the students' parents' right to freedom of religion were rejected by the district court, which applied Tinker and found that the paper did not threaten school discipline. Prohibitions of political expression by teachers—ostensibly because of the influence they exert over their pupils—have similarly been held unconstitutional under Tinker.

Another justification used by school officials who attempt to exert

18. Id. at 747-48.
19. Id. at 749.
20. 393 U.S. at 512.
control over first amendment activity has been that student publication and expression should be confined to school-related matters. The defendants in Zucker v. Panitz,24 who maintained that the Vietnam War was not connected to school concerns, attempted to keep an anti-war advertisement out of the school paper. The court found this argument unpersuasive, noting that "[i]f the [newspaper's] contents were truly as flaccid as the defendants' argument implies, it would indeed be a sterile publication."25

On the other hand, the Second Circuit has recognized the right of school officials, consistent with Tinker, to prohibit displays or publications which threaten to disrupt the school environment. The plaintiffs in Katz v. McAulay26 had distributed a leaflet in the corridors of their high school as part of an effort to raise funds for the Chicago Eight defense. When defendant school officials invoked a Board of Regents' rule forbidding the solicitation of funds from public school students, the plaintiffs filed a civil rights action for anticipatory relief against its enforcement. Acknowledging that the state's power to regulate the speech of high school students is limited by the first amendment, the court nevertheless upheld the regulation on the ground that in-school solicitation was "non-expressive . . . conduct which raise[d] a sufficiently high probability of harm—i.e. the pressures upon students of multiple solicitations—to justify the Board's interference with such communicative conduct."27

The right of school officials to prevent disruption of the learning environment has been extended to permit them to screen materials in advance of their distribution. In Eisner v. Stamford Board of Education,28 students challenged the constitutionality of such a prior approval policy. Claiming that the regulation was unsound on its face, they sought an injunction against its enforcement. The district court found for the plaintiffs, concluding that the rule imposed a prior restraint on student expression. Finding the rule to be "a regulation of speech, rather than a blanket prior restraint,"29 the court of appeals affirmed the lower court, not because the rule was unconstitutionally vague or overbroad in principle, but instead, because it was procedurally defective in that instance.30 In Eisner, Judge Kaufman relied

25. Id. at 103.
27. 438 F.2d at 1061.
28. 440 F.2d 803 (2d Cir. 1971).
29. Id. at 808.
30. Id. at 809.
on *Chaplinsky v. New Hampshire*\(^{31}\) to support prior restraints under limited circumstances\(^{32}\) and on the "forecast" exception to *Tinker* to uphold the authority of school officials to determine what material should be distributed on school property: "protected speech in public secondary schools may be forbidden if school authorities reasonably 'forecast substantial disruption of or material interference with school activities.'"\(^{33}\) In essence, *Eisner* held that school officials, empowered by the state to prevent disruptions at school, may determine in advance what publications may have that effect without unduly restricting students' first amendment rights.

The Second Circuit has made it quite clear, however, that the mere possibility of physical disruption of the school atmosphere will not suffice to overcome students' first amendment rights. From *Tinker* to *Trachtman* the Second Circuit required educators to demonstrate a narrowly defined basis for restrictions on speech or publication. As Judge Kaufman explained in *James v. Board of Education*:

> The ultimate goal of school officials is to insure that the discipline necessary to the proper functioning of the school is maintained among both teachers and students. Any limitation on the exercise of constitutional rights can be justified only by a conclusion, based upon reasonable inferences flowing from concrete facts and not abstrac-

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\(^{31}\) 315 U.S. 568 (1942).

\(^{32}\) Judge Kaufman noted that prior restraints were permissible to prevent dissemination of obscene or libelous materials or "'fighting words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'" 440 F.2d at 806 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. at 572).

\(^{33}\) 440 F.2d at 807 (quoting *Tinker*, 393 U.S. at 514). The decision in *Eisner* has drawn sharp criticism in the Seventh Circuit. In *Fujishima v. Board of Educ.*, 460 F.2d 1355 (7th Cir. 1972), *Eisner* was called "unsound constitutional law." *Id.* at 1359. The Seventh Circuit held that any system of prior submission of material for approval was unacceptable:

> We believe that the court erred in *Eisner* in interpreting *Tinker* to allow prior restraint of publication—long a constitutionally prohibited power—as a tool of school officials in "forecasting" substantial disruption of school activities. In proper context, Mr. Justice Fortas' use of the word "forecast" in *Tinker* means a prediction by school officials that existing conduct . . . —if allowed to continue—will probably interfere with school discipline [citation omitted]. *Tinker* in no way suggests that students may be required to announce their intentions of engaging in certain conduct beforehand so school authorities may decide whether to prohibit the conduct. Such a concept of prior restraint is even more offensive when applied to the long-protected area of publication.

. . . .

The *Tinker* forecast rule is properly a formula for determining when the requirements of school discipline justify *punishment* of students for exercise of First Amendment rights. It is not a basis for establishing a system of censorship and licensing designed to *prevent* the exercise of First Amendment rights. *Id.* at 1358.
tions, that the interests of discipline or sound education are materially and substantially jeopardized, whether the danger stems initially from the conduct of students or teachers.\textsuperscript{34}

It would seem, therefore, that the Second Circuit has viewed \textit{Tinker} as a mandate to school officials to permit public high school students to exercise first amendment freedoms, so long as their expression does not seriously threaten to disturb the orderly operation of schools. The essential vitality of the first amendment seems for the most part undiminished in the secondary school setting, although administrators may exercise control not only over obscene and libelous literature but also over materials whose contents or mode of distribution will disrupt the educational process. If, however, “students choose litigation to secure their first amendment rights, school authorities bear the burden of justifying school action; bare allegations that a basis existed are not sufficient.”\textsuperscript{35}

\section*{II. Trachtman v. Anker}

\textit{Trachtman v. Anker} differed from previous secondary school cases not only because the majority of post-\textit{Tinker} litigation has dealt with expressions of political views, distribution of underground newspapers, or the validity of rules requiring prior submission of literature for school distribution,\textsuperscript{36} but in two other important respects as well.

\begin{itemize}
\item \textsuperscript{34} 461 F.2d 566, 571 (2d Cir.), \textit{cert. denied}, 409 U.S. 1042 (1972).
\item \textsuperscript{36} \textit{See}, e.g., Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975) (prior submission rule invalid because lacking “guidance . . . as to what amounts to a ‘substantial disruption of or material interference with’ school activities and . . . [because] it fail[ed] to detail the criteria by which an administrator might reasonably predict the occurrence of such a disruption.” \textit{Id.} at 383); Baughman v. Freienmuth, 476 F.2d 1345 (4th Cir. 1973) (“[A] regulation requiring prior submission of material for approval before distribution must contain narrow, objective, and reasonable standards by which the material will be judged.” \textit{Id.} at 1350); Shanley v. Northeast Ind. School Dist., 462 F.2d 960 (5th Cir. 1972) (students improperly suspended for distributing newspaper containing information about birth control and marijuana off school premises; “the school board’s burden of demonstrating reasonableness becomes geometrically heavier as its decision begins to focus upon the content of materials that are not obscene, libelous, or inflammatory.” \textit{Id.} at 971); Fujishima v. Board of Educ., 460 F.2d 1355 (regulation requiring prior approval of publications is unconstitutional as a prior restraint in violation of the first amendment); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971) (school rule prohibiting distribution of newspapers without prior approval from the principal constitutionally invalid because lacking criteria for authorities to use in making their determination and without procedural safeguards to review their decision. \textit{Id.} at 59); Butts v. Dallas Ind. School Dist., 436 F.2d 728 (5th Cir. 1971) (injunction granted enjoining defendant school officials from interference with students’ right to wear armbands although officials not required to wait “until disruption actually occur[s].”
\end{itemize}
First, the threshold issue was the right of the plaintiffs to gather information, not to disseminate it. Second, school officials successfully contended that the right to be free from emotional disturbance outweighed first amendment rights.

School administrators in Trachtman did not argue that the right of students to conduct a survey and publish the results was not protected by the first amendment. Neither did the plaintiffs contest the authority of educators to regulate student conduct reasonably likely to cause substantial disruption of the educational process. Rather, the plaintiffs argued that the defendants had not adduced enough evidence to support their claim that the risk of psychological harm outweighed the plaintiffs' rights.

The majority opinion for the Second Circuit, written by Judge Lumbard, acknowledged that the "potential disruption" the defendants feared was psychological, not physical, but held that the Tinker standard required only a showing "that there was reasonable cause to believe that distribution of the questionnaire would have caused significant psychological harm to some of the Stuyvesant students."37 The majority then reviewed the evidence submitted by the defendants. Two psychologists and two psychiatrists38 had testified that the distribution of the survey could cause grave psychological damage, at least to some students. One stated that for adolescents with a "'brittle' sexual adjustment," the questionnaire posed the danger of "push[ing] them into a panic state or even a psychosis."39 Another described the questions as "highly inappropriate" for students twelve to fourteen years old.40 Two of the defendants' witnesses were concerned that the survey failed to provide "back up support or protection"41 for students disturbed by the questions.

The five experts who testified for the plaintiffs, including plaintiff Gilbert Trachtman,42 offered opinions which directly contradicted

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37. 563 F.2d at 517.
38. Two of the defendants' witnesses—one psychologist and one psychiatrist—were employed by the school system. Id. at 518.
39. Id. at 517.
40. Id. at 518.
41. Id.
42. Gilbert Trachtman's qualifications were noted in the dissenting opinion: [P]rofessor of educational psychology, director of a school psychology program and of the N.Y.U. children's consultation service, president of the school
the defendants' assertions, describing the topics in the questionnaire as "of normal interest to adolescents" and as "common subjects of conversation." Some experts noted that students at the Manhattan high school were "bombarded with sexually explicit materials" between home and school and opined that it was "highly unlikely that any student could be harmed by answering the questionnaire." Plaintiff Gilbert Trachtman and one other expert did concede, however, that there was "some possibility that some students would suffer emotional damage as a result of the questionnaire."

After reviewing the evidence for both sides, the majority concluded that the district court had overreached itself: "[t]he inquiry of the district court should have been limited to whether defendants had demonstrated a substantial basis for their conclusion that distribution of the questionnaire would result in significant harm to some Stuyvesant students." While the majority acknowledged the difficulty in formulating psychological predictions, it concluded:

[We] do not think defendants' inability to predict with certainty that a certain number of students in all grades would be harmed should mean that defendants are without power to protect students against a foreseen harm. We believe that school authorities are sufficiently experienced and knowledgeable concerning these matters, which have been entrusted to them by the community; a federal court ought not impose its own views in such matters where there is a rational basis for the decisions and actions of the school authorities.

In concurrence, Judge Gurfein re-emphasized the similarity between physical disruption and psychological harm: "a blow to the psyche may do more permanent damage than a blow to the chin." He adopted the view that the case was better left to the discretion of school officials, not only because of the dispute between the experts, but also because the plaintiffs sought to elicit, not to distribute, information.

In dissent, Judge Mansfield urged that the standard for overcoming first amendment rights be limited by the Tinker test followed in

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Psychology Educators Council of New York State, past-president of the Nassau County Psychology Association and of the School Division of the New York Psychology Association and a consultant to numerous public and private schools.

Id. at 523.
43. Id. at 518.
44. Id. at 519.
45. Id.
46. Id.
47. Id.
48. Id. at 520.
the Second Circuit. He characterized the majority's decision as “an entirely too vague and nebulous extension of the concept of ‘rights’ to support the drastic type of censorship and prior restraint sought by defendants.”49 Disputing the notion that public schools could be “marketplace[s] of ideas” while protecting all students from emotional stress, he argued that “[t]he possibilities for harmful censorship under the guise of ‘protecting’ the rights of students against emotional harm are sufficiently numerous to be frightening.”50

Turning to the evidence, Judge Mansfield stated that the defendants had failed to establish a substantial basis for their conclusion that the survey would cause some students psychological harm. He noted that a witness for the plaintiffs had testified that “in more than twenty-five years as a clinical psychologist I have never encountered a situation in which a child, adolescent, or adult has been adversely affected by a questionnaire!”51 Another witness for the plaintiffs had testified that whatever risk the survey posed was “minute compared with the enormous benefit to be derived from students’ learning that their concerns are common and developmentally normal.”52 Particular emphasis was given to the testimony of plaintiff Gilbert Trachtman, who found the defendants’ position that the survey could be harmful anomalous:

The administration of Stuyvesant High School has, in the past, offered rap groups on sexuality to its students and encouraged participation in these open-ended, face to face verbal discussions. While these groups may have been led by trained teachers, they nevertheless exposed students to a degree of peer pressure and verbal confrontation far in excess of any impact created by a voluntary and anonymous written questionnaire. . . . I would suggest that any youngster sufficiently fragile to suffer serious anxiety upon reading questions which (s)he may ignore with impunity or respond to anonymously, is a youngster too fragile to have survived the trip from home to school.53

Judge Mansfield stressed that “[a]ll of the affidavits submitted by defendants . . . assume that a student possessed of fragile sensibilities would not only read the questionnaire but make an intensive effort to answer it . . .”54 He argued that the proper standard should be

49. Id. at 521 (Mansfield, J., dissenting).
50. Id.
51. Id. at 523.
52. Id. at 525.
53. Id. at 524.
54. Id. at 522.
“not the effect of the questionnaire upon one or even a few exceptionally immature and impressionable students but its effect on the average.”

Accordingly, he proposed that the plaintiffs be permitted to survey students in ninth through twelfth grades, and that the lower court retain jurisdiction to supervise the distribution of the survey’s results.

III. THE PRESS’ RIGHT TO GATHER INFORMATION VERSUS COUNTERVAILING INTERESTS

The first amendment protects the “full flow of information to the public,” whether dissemination, reception, or gathering is involved, although the degree of protection each receives may not be

55. Id.
56. Id. at 527.
58. As numerous decisions illustrate, the first amendment protects the flow of information at all stages. Judge Gurfein, the trial judge in the Pentagon Papers Case, wrote:

A cantankerous press, an obstinate press, an ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know. . . . [T]he protection of the flow of information is not confined to political speech:

Advertising, however tasteless and excessive it . . . may seem, is nonetheless dissemination of information as to who is producing and selling what product, for what reason, and at what price. So long as we preserve a predominantly free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions. It is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed.

To this end, the free flow of commercial information is indispensable.

59. Id. at 765. In Pell v. Procunier, 417 U.S. 817 (1974), Mr. Justice Stewart, writing for the majority, acknowledged that the first amendment protects newsgathering, id. at 833, but held that the protection did not afford reporters a “right of access to prisons or their inmates beyond that afforded the general public.” Id. at 834. In Branzburg v. Hayes, 408 U.S. at 707, the majority conceded that “news gathering is not without its First Amendment protections . . . .” In his dissent in Branzburg, Mr. Justice Stewart explained that the policies underlying the first amendment support the right to gather information:

A corollary of the right to publish must be the right to gather news. The full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated. . . . News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to
the same. Thus, exceptional circumstances are needed to justify a prior restraint of publication, and the state cannot impose conditions on the receipt of constitutionally protected information. While the Supreme Court has recognized that newsgathering qualifies for first amendment protection— "without some protection for seeking out the news, freedom of the press could be eviscerated"—the degree of protection has been the subject of some controversy. In general, the Court has employed a balancing test, concluding that the societal interest in the gathering of information does not "guarantee the press a constitutional right of special access to information not available to the public generally." As a result, the Court has held that a reporter may claim no first amendment privilege against testifying before a grand jury about the identities of confidential sources; that the press has no special right of access to prisons; and that the first amendment does not protect newspaper offices from third-party searches conducted pursuant to a warrant.

While these decisions impose restrictions on the right of the press to gather information, they also suggest a test of considerable strictness in determining whether the public interest in the free collection of information is outweighed by other social concerns. In *Branzburg*

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61. 408 U.S. at 681 (majority opinion).

62. Dissenting in *Branzburg* Mr. Justice Stewart proposed that newsgathering be afforded protection equal to that given other first amendment freedoms. Thus, before the government may compel a reporter to reveal his or her sources, it must:

1. show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific violation of the law;
2. demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and
3. demonstrate a compelling and overriding interest in the information.

*Id.* at 743 (footnotes omitted).

63. *Id.* at 684 (citations omitted).


v. Hayes, where the Court held that society's interest in the prevention of crime was sufficient to overcome the right of a reporter to refuse to name those he had observed processing hashish, even the majority noted that the "state's interest must be 'compelling' or 'paramount' to justify . . . an indirect burden on First Amendment rights."67 In Pell v. Procunier, Mr. Justice Stewart, the Court's most ardent proponent of the right to gather information,68 wrote the majority opinion, which indicated that "institutional considerations such as security," give prison officials the right to limit press access to specific inmates when other means of communication remain open,69 but acknowledged that the first amendment protected the newsgathering activities of the press.70

Thus, whether or not they are protected as strongly as other first amendment interests, the press' newsgathering activities may not be burdened by governmental action without a showing of countervailing interests of considerable magnitude.

A. Minors, Schools, and Unwilling Participants

The major countervailing interest asserted in Trachtman was the possibility of harmful psychological effects on some of the students asked to respond to the survey. Whether this possibility should have been sufficient to outweigh the Voice's interest in gathering information is discussed below.71 Apart from such alleged psychological effects, however, none of the other elements present in Trachtman—the involvement of minors as survey participants, the fact that the survey would take place at school, the possible unwillingness of the participants—would, either alone or together, have been sufficient to overcome the first amendment interests at issue.

1. Minors. In accordance with the broad principle announced in Prince v. Massachusetts that "state authority over children's activi-

67. 408 U.S. at 680 (footnotes omitted).
68. See his dissenting opinions in Branzburg, 408 U.S. at 725 and Zurcher, 46 U.S.L.W. at 4552.
69. 417 U.S. at 826.
70. Id. Most recently, in Zurcher v. Stanford Daily, the Court framed the issue in terms of the applicability of the fourth amendment to searches of newspaper offices, and held that the reasonableness provisions of the fourth amendment provided adequate protection for the first amendment interests threatened. Mr. Justice Stewart, dissenting, wrote that the result of the Court's decision, "wholly inimical to the First Amendment, will be a diminishing flow of potentially important information to the public." 46 U.S.L.W. at 4550.
71. See text accompanying notes 98-103 infra.
ties is broader than over like actions of adults," 72 the Court has made special provisions for minors in some circumstances. Thus, the state may restrict a parent's control by prohibiting child labor, 73 or it may adopt stricter standards of obscenity for minors than for adults. 74 Yet the mere presence of minors is not grounds for curtailment of first amendment freedoms. That was Tinker's basic point. And in Erznoznik v. City of Jacksonville, 75 the Court rejected an argument that prohibiting drive-in theaters from showing films containing nudity was a reasonable measure to protect children. Citing Tinker, the Court stated:

Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them. In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors. 76

2. The Institutional Environment. First amendment rights may be overcome, in certain circumstances, by the public interest in preserving an institutional environment, although the restriction on speech or press must be proved necessary for the preservation of the institution's central purpose. For instance, censorship of prisoners' mail is permissible only in narrowly defined circumstances to "further one or more of the substantial government interests of security, order and rehabilitation." 77 The press, it has been shown, can claim no right of direct access to particular prisoners if the presence of journalists inside the prison presents security problems and if alternative means of communication are available. 78

In schools, it has been argued, "government enjoy[s] power to preserve such tranquility as the facilities' central purpose requires . . . but no power to exclude peaceful speech or assembly compatible with that purpose." 79 Tinker, it will be recalled, exempted from first amendment protection activity that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." 80

73. 321 U.S. 158.
75. 422 U.S. 205 (1975).
76. Id. at 209.
80. 393 U.S. at 513.
Until Trachtman the Tinker exception was interpreted narrowly and applied only to threatened physical disruption of the learning atmosphere. In Grayned v. City of Rockford81 the Court provided an example of a regulation limited in scope and accommodating both first amendment interests and the needs of the school atmosphere. Mr. Justice Marshall, writing for the majority, reversed the defendant's conviction based upon an ordinance outlawing picketing—other than peaceful labor picketing—near schools, but upheld his conviction based upon an ordinance prohibiting making noise within a specified distance of school grounds. The anti-noise ordinance, the Court concluded, was "narrowly tailored to further [the city's] compelling interest in having an undisrupted school session conducive to the students' learning, and [did] not unnecessarily interfere with first amendment rights."82 Blackwell v. Issaquena County Board of Education held that school officials might properly suspend students who created a disturbance by wearing "freedom buttons" and attempting to force others to do so.83 Regulations of first amendment rights exercised in or near schools thus have been permitted only to preserve society's interest in the peaceful operation of educational institutions.

3. The Possibility of Unwilling Participants. In general, the presence of unwilling viewers or listeners limits first amendment rights only when the communication threatens to intrude upon members of a captive audience or the privacy of the home. Customarily, the rationale applied by the Court is that the limited privacy interests of persons in public places do not overcome society's interest in free expression. In public conveyances or homes, however, people need not be subject to objectionable displays from which they cannot or should not be required to escape. Therefore, the state may not prevent the public display of offensive words either to protect public morality, to shield citizens from offensive displays, or to avert the possibility of a disturbance.84 On the other hand, a city-operated transportation sys-

81. 408 U.S. 104 (1972).
82. Id. at 119.
83. 363 F.2d 749 (5th Cir. 1966).
84. Cohen v. California, 403 U.S. 15 (1970). Defendant Cohen was arrested for wearing a jacket bearing the words, "Fuck the Draft" in a courthouse corridor, and charged with disturbing the peace by offensive conduct. The California Court of Appeal upheld his conviction because it was "reasonably foreseeable" that his conduct would incite others to a violent reaction. Quoting Tinker, Mr. Justice Harlan's majority opinion dismissed the incitement to violence rationale as an "'undifferentiated fear or apprehension of disturbance' [which] is not enough to overcome the right to freedom of expression. We have been shown no evidence that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with
tem need not accept political advertisements, and the right to communicate does not include the right to mail unsolicited "pandering advertisements" into homes. When determining the degree of protection that speech is afforded, the Court considers the nature of the forum sought to be used by those asserting the violation of first amendment rights.

Public schools, it may be argued, are unique forums: their duty to "educate the young for citizenship" requires that students be permitted the broadest possible exercise of constitutional rights, according to Tinker. Nonetheless, first amendment rights may be limited since students are compelled by law to attend school and are thus in some sense captives. In addition, courts have recognized the "important, delicate, and highly discretionary functions" of school administrators, and have been reluctant to interfere in the operation of schools.

Where free speech rights are at issue, however, the courts are not persuaded by the argument that students or teachers have no right to expose others to their views. In Tinker, the Court found no evidence that the wearing of armbands constituted "collision with the rights of other students to be secure and to be let alone." Similarly, the Second Circuit, in James v. Board of Education, described students as a "captive group" in reference to the display of an armband by a teacher, but held that the teacher was entitled to protest the Vietnam War.

execrations like that uttered by Cohen." Id. at 22. See also Erznoznik v. City of Jacksonville, 422 U.S. 205.

85. Lehman v. City of Shaker Heights, 418 U.S. 298 (1974). The city justified its policy against accepting political advertisements as economically sound (it eliminated the possibility that short-term political advertising during election periods would crowd out long-term non-political advertisers) and defended by pointing to the possibility of favoritism and the risk of subjecting a captive audience to political propaganda. The plaintiff's assertion of a right of access to a publicly-owned area was outweighed by the city's right to control its use. In concurrence, Mr. Justice Douglas stated that commuters had a right "to be free from forced intrusions on their privacy" and that this right "preclude[d] the city from transforming its vehicles . . . into forums for the dissemination of ideas upon this captive audience." Id. at 307.

86. Rowan v. United States Post Office, 397 U.S. 728 (1970). Bulk mailers unsuccessfully challenged the constitutionality of an act limiting the mailing of such materials. The Supreme Court concluded that "no one has a right to press even 'good' ideas on an unwilling recipient. That we are often 'captives' outside the sanctuary of the home and subject to objectionable speech and other sound does not mean we must be captives everywhere." Id. at 738. See also Hynes v. Mayor & Council of Oradell, 425 U.S. 610 (1976).


88. Id. at 637.

89. 393 U.S. at 508.

90. 461 F.2d at 573.
The argument that students are captives was advanced to expand their exercise of first amendment rights in *West Virginia State Board of Education v. Barnette,* a 1943 case which held that because the state compelled attendance it could not authorize the expulsion of students whose religion would not permit them to salute the flag. The argument that captive students should be subject to a restricted flow of information in their school newspaper was expressly rejected by a Virginia district court in *Gambino v. Fairfax County School Board* when, relying on *Lehman,* defendant school administrators attempted to prevent publication of an article on contraception. The court quoted Justice Brandeis in *Packer Corporation v. Utah,* where he spoke of newspapers and magazines as requiring "'some seeking by the one who is to see and read the advertisement.' " The district court in *Gambino* observed:

No substantive distinction can be drawn between the relative lack of choice in exposure to the communication in this case and that in *Tinker.* If anything, the students of Hayfield are less captive because they must act affirmatively to pick up the newspaper. In *Tinker* the non-protesting students were required to avert their eyes to avoid the message.

The relation between captivity and privacy interests is, however, a delicate one, and attempts to elicit personal information, when sponsored by the school, may be considered an abuse of educators' discretion. In *Merriken v. Cressman,* a junior high school student and his mother brought an action to enjoin the administration of a commercial drug intervention program in his school. The program, which sought to identify and counsel potential drug abusers, was to be adopted through the use of a questionnaire which asked students to provide information about race and religion, as well as family composition and closeness. In addition, it asked students to identify classmates who made "unusual or odd remarks" and who had difficulty getting along with other students. The company promoting the program made no provision to safeguard the identities of students targeted as potential drug abusers, and school authorities had permitted the company to institute the program without the "affirmative con-
sent” of students' parents. The district court held that the program was a violation of students' right to privacy, and a usurpation of the “exclusive privileges of parents.”

While the survey in *Trachtman* also sought to collect highly personal information, it is distinguishable from the *Merriken* survey. The *Trachtman* survey was not presented under the sponsorship of school authorities, which may tend to increase the likelihood of coercion; and it did not attempt to collect information about other students. Participation was entirely voluntary. Moreover, the survey was not planned as part of any formal counseling program; it was, in fact, presented to the student populace as an attempt at “personal intercommunication.” While surveys initiated and conducted by students may be subject to abuses of confidentiality and peer pressure, adequate procedural safeguards in their administration could cure these problems. Although the *Trachtman* court might have based its holding on a finding that the questionnaire was an invasion of students' privacy interests, and that the character of the survey made it impossible for students to make an informed decision about whether to participate, it did not do so.

B. The Possibility of Psychological Harm

Previous decisions have made it clear that only the most compelling countervailing interests are deserving of greater protection than first amendment rights. When the possibility of physical disruption is asserted, the harm must be clearly threatened. The Supreme Court established a stringent test for physical disruption in *Cohen v. California*: “substantial numbers of citizens [must be] standing ready to strike out physically . . . .” When the *Trachtman* court permitted the possibility of psychological harm to outweigh the right of students to gather information, it deferred to the judgment of school officials, since “psychological diagnoses . . . are . . . difficult . . . .” In effect, the court permitted the possibility of emotional disturbance to overcome first amendment rights without requiring a substantial showing that such harm was likely.

Yet the threat of psychological harm lurks in the background of many major first amendment cases. The Supreme Court has in the past found the public interest in free speech and expression of greater

97. *Id.* at 922.
98. 403 U.S. at 23.
99. 563 F.2d at 519.
concern than the protection of emotional interests, as evidenced by the number of cases in which the possibility of psychological harm might have been but was not considered by the Court.

A Jehovah's Witness who went from house to house in a predominately Catholic neighborhood broadcasting a record which attacked the Catholic religion was protected by the first amendment, the Court ruled in *Cantwell v. Connecticut*. American Nazis could not be enjoined from displaying swastikas and parading through a largely Jewish town, even though thousands of residents of that town were concentration camp survivors, according to *Village of Skokie v. National Socialist Party of America*. Scabrous language displayed in public to express a political point of view is deserving of first amendment protection, the Court held in *Cohen v. California*. A city's interest in protecting children from highly visible displays of nudity does not permit the banning of all films containing nudity from drive-in screens, said *Erznoznik v. City of Jacksonville*.

While none of these decisions advocates the infliction of psychological harm, all reflect a social policy which deems first amendment values of greater importance than the risk of offending or disturbing a small group of people. In *Cantwell, Skokie, Cohen, and Erznoznik*, children of no greater emotional stability than those in *Trachtman* were included in the group of people the Court found obliged to submit to offensive displays. In each case the possibility of psychological harm seems to have been at least as imminent as in *Trachtman*. If emotional interests are to be treated by courts as deserving of greater protection than first amendment rights, the standard applied should be analogous to the compelling or substantial showing required of other countervailing interests.

**Conclusion**

The standard accepted by the *Trachtman* court when considering the possibility of psychological harm appears to be inconsistent with previous first amendment cases, because it permits the rights of a concededly small number of students whose very existence cannot readily be proved to overcome the rights of all students freely to exchange ideas. The addition of an allegation of possible psychological harm appears to be inconsistent with previous first amendment cases, because it permits the rights of a concededly small number of students whose very existence cannot readily be proved to overcome the rights of all students freely to exchange ideas. The addition of an allegation of possible psychological

100. 310 U.S. 296 (1940).
101. 69 Ill. 2d 605, 373 N.E.2d 21 (1978).
102. 403 U.S. 15.
103. 422 U.S. 205.
harm to the elements in *Trachtman* should, therefore, be insufficient to overcome the first amendment issues at stake in the case.

While the dissent in *Trachtman* found "no significant legal distinction" between the gathering and dissemination of information about sex, the concurring opinion emphasized that the holding was limited to attempts to gather information, "lest the majority decision serve as an unintended precedent in derogation of First Amendment right." Nonetheless, if the right to collect information is a first amendment right, the decision in *Trachtman v. Anker* may represent a significant inroad into the rights of high school students. As the conflict between the parties' experts indicates, it is easy to assert and difficult to disprove the possibility of psychological harm.

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104. 563 F.2d at 526.
105. Id. at 520.